

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	

To: Secretary, Federal Communications Commission

**REPLY OF MARKETLINK, INC. TO OPPOSITIONS TO
PETITIONS FOR RECONSIDERATION**

Marketlink, Inc. (“Marketlink”) hereby respectfully submits this Reply to Oppositions to Petitions for Reconsideration of the Commission’s February 15, 2012 Report and Order in the above-captioned proceeding.¹ As discussed below, the record confirms that the Commission should reconsider and eliminate the requirement for sellers to provide an automated, interactive opt-out mechanism when making live, non-prerecorded telemarketing calls using predictive dialers. It should also limit the application of its new prior express written consent requirements to autodialed and prerecorded telemarketing “robocalls,” as originally intended, and avoid encompassing live calls made using predictive dialer technologies.

I. About Marketlink.

Founded in 1992 and headquartered in Des Moines, Iowa, Marketlink offers customer engagement solutions to clients in the cable television, telecom, financial services, agriculture, pharmaceutical, and manufacturing industries. It is ATA-SRO accredited and has grown by providing clients with excellent results, outstanding quality, and highly responsive service. Marketlink currently employs a staff of more than 500 at eight call centers in Des Moines,

¹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830 (2012) (“*Robocall Report and Order*”).

Indianola, Storm Lake and Carroll, Iowa and Fairmont, Minnesota. It is a member of the Jobs4America coalition and supports the Chairman's efforts to bring 100,000 call center jobs back to the U.S. as part of that initiative.

II. The Record Confirms that the Commission Should Eliminate the Requirement for Callers to Provide an Automated, Interactive Opt-Out Mechanism When Making Live Calls.

In the *Robocall Report and Order*, the Commission adopted a rule requiring callers to include an automated, interactive opt-out mechanism during “abandoned” prerecorded and autodialed telemarketing calls (the “opt-out rule”).² Under the Commission's current interpretation of the Telephone Consumer Protection Act (“TCPA”), calls made using certain predictive dialers are considered autodialed calls – even though such calls are not “robocalls” and instead connect consumers directly with live representatives. Marketlink and others requested that the Commission reconsider and eliminate this rule as applied to live calls (*i.e.*, calls made using predictive dialers) because the Commission failed to provide the public with the notice and an opportunity to comment required by the Administrative Procedure Act (“APA”). The rule should also be eliminated for live calls because it undermines the Commission's goal of harmonizing its TCPA rules with the Federal Trade Commission's (“FTC”) rules and perversely encourages parties to either use prerecorded message robocalls instead of live agents or reduce consumer privacy by switching to manual dialing. It also imposes unreasonable costs on small and medium-sized businesses and threatens existing jobs and job creation efforts.

² See *id.* at Appendix A, which redesignates 47 C.F.R. § 64.1200(a)(6) as 47 C.F.R. § 64.1200(a)(7) and adds the automated opt-out mechanism requirement.

Although three TCPA plaintiffs filed comments³ opposing the elimination of the opt-out rule for live calls, their filings are unpersuasive and fail to offer any legal justification for retaining the rule. The Commission should therefore reject the opposing comments and eliminate the opt-out rule expeditiously as applied to live calls before additional harm occurs.

A. The Commission Failed to Meet the APA Notice and Comment Requirements Before Adopting the Rule for Live Calls.

Under the APA, Federal agencies must publish “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”⁴ After notice is provided, “the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments”⁵ The final rule adopted must be a “logical outgrowth” of the proposed rule, not “stray[ing] too far from the description contained in the initial notice”⁶ The Commission failed to meet these statutory requirements when it adopted the opt-out rule for live calls.

In the *Robocall NPRM*,⁷ the Commission invited comment on proposed revisions to its TCPA rules that “would harmonize those rules” with the FTC’s recently amended Telemarketing

³ Comments of Robert Biggerstaff Opposing the Petitions for Reconsideration of PACE, Marketlink, and SatCom, CG Docket No. 02-278 (filed Oct. 18, 2012); Comments of Joe Shields on the Petitions for Reconsideration of PACE, Marketlink and SatCom Marketing, CG Docket No. 02-278 (filed Oct. 18, 2012); Gerald Roylance’s Comments on Petitions for Reconsideration, CG Docket No. 02-278 (filed Oct. 1, 2012; supplement filed Oct. 18, 2012) (“Roylance Comments”). For an example of TCPA cases filed by the same parties that filed oppositions, *see, e.g., Joe Shields v. Americor Lending Group, Inc. et al.*, NO. 01-06-00475-CV (Tex. App.); *Gerald Roylance v. ADT Security Services, Inc. et al.*, No. 5:08-cv-01101-JF (N.D. Ca.); *Robert Biggerstaff v. Low Country Drug Screening*, No. 99-SC-86-5519 (Magis. Ct. S.C.).

⁴ 5 U.S.C. § 553(b)(3).

⁵ *Id.* § 553(c).

⁶ *See, e.g., Council Tree Commc’ns, Inc. v. FCC*, 619 F.3d 235, 249 (3d Cir. 2010) (*internal citations omitted*).

⁷ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, 25 FCC Rcd 1501 (2010) (“*Robocall NPRM*”).

Sales Rule (“TSR”).⁸ As part of the revisions, the Commission stated that it was proposing a rule that would, consistent with the FTC’s rules, require “*prerecorded* telemarketing calls [to] include an automated, interactive mechanism by which a consumer may ‘opt out’ of receiving future *prerecorded* messages from a seller or telemarketer”⁹ Notwithstanding this limited proposal, the final rule adopted by the Commission extended the requirements far beyond *prerecorded messages* to include all prerecorded *and autodialed live telemarketing calls*.¹⁰

Parties had no notice or opportunity to comment on whether live calls made with predictive dialers should be subject to the new opt-out mechanism requirements. The only discussion of the proposed opt-out mechanism appears in the *Robocall NPRM* under the heading “Prerecorded Message Calls,”¹¹ and there is no reference to live calls – or even autodialed calls in general – in that section. A separate section of the *Robocall NPRM* that specifically addressed abandoned call and predictive dialer issues likewise makes no reference to any proposed opt-out mechanism for such calls.¹² Moreover, the Commission included the specific text of the proposed TCPA rule revisions in the *Robocall NPRM*, and the text fails to provide notice that the Commission was considering adopting an opt-out rule for live calls, referring only to an opt-out mechanism included with *prerecorded* messages.¹³ This approach does not fulfill the

⁸ *Id.* ¶ 1.

⁹ *Id.* ¶ 2 (emphasis added).

¹⁰ See *Robocall Report and Order* ¶¶ 44-49 (emphasis added). As noted above, this extension encompasses live telemarketing calls made using predictive dialers, and certain predictive dialers are considered autodialers under the Commission’s current interpretation of the TCPA.

¹¹ *Robocall NPRM* ¶¶ 37-43.

¹² *Id.* ¶¶ 44-47.

¹³ *Id.* at Appendix A, revised rule § 64.1200(b)(2)(A), (b)(2)(B). In fact, the proposed rule text did not even encompass all *prerecorded* calls – it would only have required an interactive opt-out mechanism for “artificial or prerecorded telephone messages delivered to residential telephone subscribers,” excluding calls to wireless telephone numbers. *Id.* (emphasis added).

Commission’s “obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible.”¹⁴

The opposing commenters assert that the Commission sought comment on opt-out mechanisms for “any prerecorded messages” and that the prerecorded identification message that callers must deliver as part of an abandoned call¹⁵ is technically a “prerecorded message,” but this argument fails. Nowhere in the *Robocall NPRM* did the Commission seek comment on opt-out mechanisms for “any prerecorded messages” or discuss an opt-out rule for abandoned calls. Even if one were to treat the Commission-required abandonment message as a “prerecorded message” being addressed by the *Robocall NPRM*, it is nonsensical to think that the Commission was seeking comment on a mechanism for consumers to opt-out of receiving that message.

Applying the opt-out mechanism requirement to live calls is also not a “logical outgrowth” of the proposed rule. The FTC rules that the Commission was purportedly trying to harmonize with apply only to *prerecorded* calls, and there is no discussion or suggestion anywhere in the *Robocall NPRM* that the Commission was contemplating extending the opt-out requirements to autodialed calls, and to live calls in particular. Nor did the Commission seek comment on areas in which the FTC’s opt-out rules may be inadequate or could otherwise be improved more generally. Marketlink is also unaware of any commenter that recommended extending the opt-out rule to live calls. Instead, the Commission created the opt-out mechanism requirement for live calls out of whole cloth, without notice. As courts have recognized, “[t]he ‘logical outgrowth’ doctrine does not extend to a final rule that is a brand new rule, since something is not a logical outgrowth of nothing, nor does it apply where interested parties would

¹⁴ *Home Box Office v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977).

¹⁵ See 47 C.F.R. § 64.1200(a)(7)(A).

have had to divine the Agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule[.]”¹⁶ For these reasons, the Commission should eliminate the opt-out rule for live calls.

B. The Opt-Out Rule for Live Calls Undermines the Commission's Harmonization Efforts and Encourages Parties to Either Deliver More Robocalls or Diminish Consumer Privacy.

Harmonization with the FTC's rules. By extending the opt-out rule to autodialed calls (including live calls), the Commission exacerbated the original problem that it was trying to solve – namely, conforming its TCPA rules with the FTC's rules. As the Professional Association for Customer Engagement (“PACE”) explained in its Petition for Reconsideration,¹⁷ the Do-Not-Call Implementation Act (“DNCIA”) requires the Commission to “consult and coordinate” with the FTC to “maximize consistency” with the FTC's TSR.¹⁸ Although complete harmonization is not necessarily required by the DNCIA, the *Robocall Report and Order* fails to explain the reason for the disparity (or, as noted above, even give notice and an opportunity to comment that the Commission was considering creating disparate rules).

Encouraging more robocalls. Applying the opt-out rule to live calls could perversely encourage parties to deliver more prerecorded calls, contrary to the Commission's and the FTC's goal of preventing unwanted telemarketing robocalls. For example, if a caller uses a predictive dialer to place live calls and inadvertently creates an abandoned call, the caller would be required to provide the opt-out mechanism and the Commission-required abandonment message – but it

¹⁶ *Int'l Union, United Mine Workers v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259-60 (D.C. Cir. 2005) (internal markings and citations omitted).

¹⁷ Professional Association for Customer Engagement's Petition for Reconsideration, CG Docket No. 02-278, 5-6 (filed July 11, 2012) (“PACE Petition”).

¹⁸ Do-Not-Call Implementation Act, Public Law No. 108-10, 117 Stat. 557 § 3 (2003), *codified at* 15 U.S.C. § 6101.

would *not* be able to deliver the actual telemarketing solicitation to the recipient. If the same caller instead used a prerecorded message, it would still need to provide the opt-out mechanism but would at least be able to deliver the telemarketing solicitation contained in the prerecorded message. The Commission did not discuss this impact of extending the opt-out rule to live calls.

Diminishing consumer privacy. Imposing the opt-out rule on live calls could also encourage callers to stop using predictive dialers in favor of placing the same calls manually. Predictive dialers enhance consumer privacy in many ways, including by preventing improper calls to numbers on Federal, state, or entity-specific do-not-call lists; limiting calls to certain times of the day, days of the week, number of attempts per campaign; enabling consumer-specific calling preferences (*i.e.*, contact me at my work telephone number during the day and my home telephone number at night); allowing a specified amount of time to lapse between calls; providing for timely scheduled callbacks requested by a customer; and eliminating “wrong number” dialing caused by manual number entry. They also facilitate compliance with other consumer protection laws. These significant benefits would all be lost as callers switch to manual dialing methods, and the Commission failed to explain why it nonetheless adopted the opt-out mechanism for live calls.

C. The Rule Imposes Unreasonable Costs on Small and Medium-Sized Businesses and Threatens Existing Jobs and Job Creation Efforts.

The *Robocall Report and Order* stated that the new opt-out rule would not be “especially burdensome or pose extraordinary technical issues” and noted that the FTC found that “industry comments uniformly represent that interactive technology is affordable and widely available.”¹⁹

¹⁹ *Robocall Report and Order* ¶ 69.

To the contrary, when applied to live calls made using predictive dialers, the rule imposes significant costs on small and medium-sized businesses, threatening jobs and job creation efforts.

For example, Marketlink's current predictive dialing system (which was upgraded within the past three years) cannot include an automated opt-out mechanism while an abandonment message is played. Marketlink's intent is to connect its live representatives with a client's customers and other consumers quickly and efficiently, not to play a recorded message. As Marketlink noted in its Petition, its vendor's proposed cost for adding the opt-out mechanism functionality was \$84,000. In addition to adding the required functionality, Marketlink would also need to spend thousands of dollars to develop a new database for processing automated opt-out requests and making sure that the opt-out information is transmitted to Marketlink's clients.²⁰ Because dialing technology has advanced so much over the past few years, Marketlink abandons only approximately 0.33% of calls dialed, or 1.3% of its live connects. Thus, the costs of adding the opt-out mechanism for live calls would benefit very few consumers.

The significant costs for companies to implement the opt-out rule for live calls, such as equipment upgrade costs and higher per-call expenses for manually dialed calls, could threaten American jobs and undermine the Chairman's efforts to bring 100,000 call center jobs back to the U.S as part of the Jobs4America initiative.²¹ Predictive dialers help callers filter out

²⁰ Contrary to suggestions by Gerald Roylance, Marketlink did not spend all or a portion of the stated \$84,000 to obtain the prototype opt-out mechanism discussed in its Petition. Marketlink also takes this opportunity to respond to false accusations made by Gerald Roylance in his opposing comments. Contrary to Roylance's assertions, Marketlink complies with the Commission's prerecorded identification message requirements for abandoned telemarketing calls. Its abandonment message states the name and telephone number of the business on whose behalf the call is placed, and that the call is for "telemarketing purposes." The telephone number provided permits individuals to make a do-not-call request during regular business hours during the duration of the telemarketing campaign. Marketlink also maintains records establishing compliance with these requirements.

²¹ Marketlink is a member of the Jobs4America coalition and continues to support the Commission's efforts to promote broadband innovation in the U.S.

unproductive calls (*e.g.*, busy signals and unanswered calls) and increase productivity by dramatically increasing the time that live representatives spend on the telephone talking to consumers. As noted above, the rule also encourages companies to use prerecorded robocall messages instead of predictive dialers, further raising the possibility of call center job losses.

III. The Record Confirms that the Commission Should Eliminate the “Prior Express Written Consent” Requirement for Live Calls or, at a Minimum, Modify the Definition of “Prior Express Written Consent” for Live Calls.

Marketlink also supports requests from other parties for the Commission to reconsider and eliminate its decision to require “prior express written consent” from customers and other consumers before placing live telemarketing calls using predictive dialers. Predictive dialers are modern electronic systems that help live representatives dial a pre-determined list of telephone numbers already contained in a company’s database, and they do not raise the same concerns as autodialed and prerecorded message robocalls. Moreover, the compliance costs with obtaining written consent from customers and maintaining records of the consents impose a significant cost burden on small and medium-sized businesses.

If applied to predictive dialers, the Commission’s written consent requirements could significantly hinder the ability of companies to contact their customers. Customers often provide their wireless telephone numbers to companies and expect to do business using those telephone numbers. Increasingly, they are the only telephone numbers at which customers can be reached, as approximately one-third of American households are wireless-only (with that number continuing to grow).²²

Predictive dialers do not enable callers to impose any additional costs on consumers (including consumers that use wireless telephones). Instead, they only facilitate the same calls to

²² See, *e.g.*, PACE Petition at 17 (internal citations omitted).

the same parties that can be reached through manual dialing under the TCPA – but without the risk of dialing errors. And unlike prerecorded messages, which can be sent to thousands of telephone lines every minute, calls made with predictive dialers require a live person to communicate with each customer. When calling wireless telephone numbers, for example, Marketlink only contacts customers with whom a company has an existing relationship. As noted above, predictive dialers also enhance consumer privacy and help Marketlink comply with Federal and state do-not-call lists. Therefore, unnecessary restrictions on the use of predictive dialers to place live calls to consumers at the wireless telephone numbers that they provided are counterproductive.

If the Commission maintains the prior express written consent requirement for calls made using a predictive dialer, it should nonetheless modify the definition of “prior express written consent.” Under the definition adopted in the *Robocall Report and Order*, parties must disclose that they will place calls using an autodialer or prerecorded message when they seek opt-in consent from a consumer. The Commission should eliminate this disclosure requirement or, at a minimum, confirm that callers using predictive dialers can use more accurate disclosure language, such as that they will be making live calls using predictive dialers.

Respectfully submitted,

A handwritten signature in cursive script, reading "Kourtney Keough".

Kourtney Keough
President/CEO Marketlink, Inc.
4305 Fleur Drive
Des Moines, IA 50321
800-434-3221 (phone)
515-285-9640 (fax)
kkeough@marketlinkinc.com

October 29, 2012